U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 23 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a greenhouse. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and previously submitted evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $50,794 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 2000.

On the petition, the petitioner claimed to have been established in 1936, to have a gross annual income of $1,000,000, and to currently employ twenty workers. In support of the petition, the petitioner submitted copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001, and the petitioner's checking account statements.

The tax returns reflect the following information for the following years:

	2000[1]	2001

[1] The petitioner's 2000 tax return is not necessarily dispositive of its ability to pay the proffered wage since it precedes the priority date of the instant visa petition.

Net income[2]	$52	$476
Current Assets	$33,646	$91,627
Current Liabilities	$56,315	$99,669
Net current liabilities	$22,669	$8,042

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 2, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested quarterly tax returns, Forms 1099 or W-2, or other personnel records to reflect payments of wages actually paid to the beneficiary already.

In response, the petitioner submitted a letter fro[redacted] Associate Professor of Accounting at Cleveland State University; additional checking account statements from the petitioner; an annual tax return for agricultural employees for 2002 showing that the petitioner paid total annual wages of $121,629.57 to its employees; and quarterly wage reports for the four quarters of 2002. The quarterly wage reports reflect that the petitioner actually employed and paid the beneficiary wages in the total amount of $5,333.91, which is $45,460.09 less than the proffered wage. An accompanying letter from the petitioner's former counsel states that the beneficiary was "employed for the petitioner in the past on the part time basis on H1-B [sic] visa. In 2002 beneficiary [sic] worked for the Petitioner for the two first quarters but the Petitioner's [sic] continues his offer of the full-time employment based on the approved labor certification...." No evidence was provided concerning the beneficiary's wages received while he was "employed for the petitioner in the past on the part time basis."

Mr. McClain states the following in his letter:

> According to the [petitioner], the intended immigrant beneficiary will be a replacement for an existing worker who is leaving, and not a new hire. This will normally indicate that the hiring of the new beneficiary will not significantly increase cash payments beyond any additional higher salary to be received by the intended immigrant beneficiary.

No evidence was submitted concerning the purported replacement of an existing worker.

The letter from [redacted]eferences the banking statements from the petitioner and states that the petitioner's financial standing is strong based on the its average monthly balances for 2001 and 2002[redacted] states that the petitioner's average month-end cash balance for 2002 was $64,533 and its month-end cash balance for 2001 was $44,893, reflecting "a rather remarkably steady and solid cash flow situation." He also discusses the petitioner's business longevity, and its positive retained earnings and low debt reflected on its Schedule L to its tax returns and consideration of depreciation expenses. [redacted]findings were based upon the petitioner's provision of financial data.

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[2] Taxable income before net operating loss deduction and special deductions on Line 28 of the tax returns.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 31, 2003, denied the petition.

On appeal, counsel asserts that *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) applies to the instant petition because of its business longevity and real estate holdings. Counsel also asserts that depreciation should be added back to the petitioner's cash assets since it is an "imaginary figure"; that the petitioner's monthly ending bank balances evidence enough cash to pay the beneficiary's proffered wage when broken down into a monthly wage; and unreported AAO decisions hold that a petitioner can still demonstrate an ability to pay the proffered wage with sufficient cash despite reporting a loss on tax returns. Counsel resubmits previously submitted evidence.

Counsel also references [redacted] report as corroborative evidence of the petitioner's ability to pay the proffered wage. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). [redacted] letter relies upon bank statements and the petitioner's federal tax returns – both which are in the record of proceeding. [redacted] findings differ from the director's findings. The AAO concurs with the director for reasons that will be discussed below.

Counsel and [redacted] reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001. No evidence was provided concerning the petitioner's actual employment of and payment of wages to the beneficiary in 2001. The petitioner only submitted evidence of actual employment of and payment of wages paid to the beneficiary in 2002, which was $45,460.09 less than the proffered wage. Thus, the petitioner has not presented a *prima facie* case of its ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held

that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Thus, case law very clearly establishes that depreciation cannot be considered, contrary to [redacted] and counsel's assertion. The petitioner's net income for 2001 was $476, which is not enough to cover a proffered wage of $50,794 per year.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, however, were negative. Thus, the petitioner could not establish its ability to pay the proffered wage from its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001. In 2001, the petitioner shows a net income of only $476 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

Counsel suggests that *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) should apply to the petitioner's case to overcome its deficiencies on its tax returns. *Sonegawa*, however relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Additionally, counsel's reference to the petitioner's real estate holdings does not provide a nexus to the facts of *Sonegawa* nor to proving an ability to pay a proffered wage outside of the *Sonegawa* context. Real estate holdings are not the type of liquid asset appropriate to use to compensate employees.

Additionally, counsel referenced unpublished AAO decisions to support her assertions that the petitioner's bank balances should overcomes the deficiencies of its tax returns. However, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.